No. 19-563

In the Supreme Court of the United States

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL.,

Petitioners

v.

PATRICK J. COLLINS, ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* BRYNDON FISHER, BRUCE REID, AND ERICK SHIPMON IN SUPPORT OF NEITHER PARTY

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether shareholders' claims challenging the Third Amendment, in which the alleged injury is Fannie Mae's and Freddie Mac's overpayment to Treasury, are derivative, as opposed to direct, claims.

2. Whether, under HERA's "succession clause," shareholders have standing to assert derivative claims on behalf of Fannie Mae and Freddie Mac, where the conservator faces a manifest conflict of interest in determining whether to bring suit.

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INTEREST OF *AMICI CURIAE*[1]

Bryndon Fisher and Bruce Reid are each shareholders in both Fannie Mae and Freddie Mac, and Erick Shipmon is a shareholder in Fannie Mae. *Amici* are plaintiffs in actions pending in the United States Court of Federal Claims (Case Nos. 13-608C, 14-152C) in which, as shareholders, they assert derivative claims on behalf of Fannie Mae and Freddie Mac against the United States for (i) an unlawful taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution; (ii) an illegal exaction in violation of the Fifth Amendment of the U.S. Constitution; and (iii) breach of fiduciary duty. The injury upon which *amici's* claims are based is the harm to Fannie Mae and Freddie Mac caused by the Third Amendment.

Amici are the only shareholders with claims pending in the Court of Federal Claims who have consistently and exclusively asserted derivative claims on behalf of Fannie Mae and Freddie Mac in

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[1] *Amici curiae* notified the parties ten days before the date this brief was due of their intent and request to file it. All parties consented to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

connection with the harm caused by the Third Amendment.

This case is of particular interest to *amici* because the issues presented in the petition may have a direct and potentially dispositive impact on *amici*'s pending claims against the United States. If the Court grants the petition, it may resolve issues that shareholders and the Government have contested across numerous lawsuits arising from the Third Amendment, which have resulted in conflicting district and circuit court decisions on multiple issues.

Moreover, this case raises important constitutional questions, including the circumstances in which Congress may, by statute, deny injured parties a judicial forum for a constitutional claim. The resolution of this important issue will have a direct impact on *amici's* constitutional claims pending in the Court of Federal Claims.

SUMMARY OF THE ARGUMENT

Amici agree with the Government that the decision below warrants Supreme Court review. The decision below addresses important questions for which circuit conflicts exist and which have substantial practical importance. A decision by this Court will resolve legal issues common to a profusion of related, pending litigation concerning the Third Amendment.

Although the Government does not describe it as a "question presented," it asks this Court to grant review and reverse the court of appeals' holding that the shareholders' claims relating to the Third Amendment are direct. On this point, the *amici* and

the Government agree: given the nature of the claims asserted, the injury upon which the shareholders' claims are based, and the available remedies, the claims the shareholders assert are derivative.

From there, the *amici* and the Government diverge. The Government argues that the so-called "succession clause" of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(b)(2)(A), displaces established corporate law under which shareholders may pursue a derivative action where those in control of the corporation face a manifest conflict of interest in deciding whether to bring suit. HERA's text and history, however, reveals no Congressional intent to displace longstanding corporate law permitting shareholders to bring derivative suits where the parties in control of a corporation face a conflict of interest. To the contrary, the origin of the succession clause indicates an intent to preserve such shareholder rights.

Specifically, HERA's succession clause was copied from the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which courts have consistently construed to permit derivative actions during a conservatorship or receivership of a bank where the conservator or receiver faces a manifest conflict of interest that prevents the conservator or receiver from objectively determining whether to bring suit. Rather than draft HERA to expressly diverge from this established, existing law, Congress adopted the precise operative legislative language from FIRREA, thereby adopting existing law that construed those operative terms.

Moreover, the Government's construction of HERA would raise serious constitutional issues because, if the succession clause were construed to bar all derivative suits on behalf of Fannie Mae and Freddie Mac, including the *amici's* takings and illegal exaction claims pending in the Court of Federal Claims, such a holding would unconstitutionally deny shareholders a remedy for constitutional violations. The court of appeals recognized this problem with respect to the shareholders' claim that the structure of the FHFA violates Article II, §§ 1 and 3 of the Constitution. On that issue, the court of appeals correctly held that HERA's succession clause could not bar such a constitutional claim. To the extent that Congress may foreclose a constitutional claim at all, there must be a "heightened showing" that Congress specifically intended to "deny any judicial forum for a colorable constitutional claim." App., 55a–56a (quotations omitted). The Government has made no such showing.

Amici agree with the parties that this is the proper time for the Court to resolve conflicts as to core questions pertaining to HERA and its relationship to the Constitution—namely, whether shareholders' claims are derivative, and, assuming they are derivative, whether HERA's succession clause categorically bars shareholders from asserting derivative claims, including constitutional claims.

ARGUMENT

A. The Shareholder Claims Are Derivative.

Although the petition's questions presented do not include whether the shareholders' claims here

are direct or derivative, the Government argues that the court of appeals erred in determining certain shareholders' claims are direct. Pet. 21. *Amici* agree.

The court of appeals sidestepped established law that resolves whether claims are derivative or direct, focusing instead on the APA's broad grant of standing for parties who are "adversely affected or aggrieved by agency action." This holding, which conflicts with the holdings of multiple other circuit courts addressing the same issue, is incorrect.

1. The Injury Alleged in this Case.

The court of appeals held that shareholders' standing derived from 5 U.S.C. § 702, which permits a person "adversely affected or aggrieved by agency action" to obtain judicial review. The only "adverse effect" the court of appeals identified, on which it based its decision that the shareholders' claims are direct, was that shareholders "were excluded from the GSEs' profits." App., 29a.

The reference to being "excluded from the GSE's profits" refers to the terms of the Third Amendment, which required the GSEs to hand over to Treasury their positive net worth each quarter, minus a small cushion, to the Government. Put another way, the property the Government seized through the Third Amendment is simply the companies' rights to their future earnings.

Although the court of appeals characterized the injury as an "exclus[ion] from the GSEs' profits," the terms of the Third Amendment, taken at face value, refer to the *GSE's* net worth at the end of each quar-

ter. The transactions at issue are between the GSEs and the Government; no money or other property has been taken from the shareholders that is distinct from the property and money taken from the GSEs.

2. The Applicable Law on Resolving Whether a Claim Is Direct or Derivative.

Where a shareholder's claims arise under federal law (as with shareholders' APA claims here), federal law dictates whether the claims are direct or derivative. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 (1991) ("[A]ny common law rule necessary to effectuate a private cause of action … is necessarily federal in character."); *see also* Wright & Miller et al., Fed. Proc. & Proc. § 1821 ("[I]n suits in which the rights being sued upon stem from federal law, federal law will control the issue whether the action is derivative.").

Under federal law, however, there exists a "presumption that state law should be incorporated into federal common law" unless doing so in a particular context "would frustrate specific objectives of the federal programs." *Kamen*, 500 U.S. at 98. This presumption "is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Id.* "Corporation law is one such area." *Id.*; *see also Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.").

In any event, in resolving whether a claim is derivative or direct, federal law aligns with Delaware law. *Franchise Tax Bd. of Cal. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 336–37 (1990) (holding that only "shareholder[s] with a direct, personal interest in a cause of action," rather than "injuries [that] are entirely derivative of their ownership interests" in a corporation, can bring actions directly").[2]

The leading decision on whether claims are direct or derivative is *Tooley v. Donaldson Lufkin & Jenrett, Inc.*, 845 A.2d 1031 (Del. 2004). There, the Delaware Supreme Court held that the two core questions relevant to distinguishing between direct and derivative claims are "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id.* at 1033.

With respect to the first prong of *Tooley*—who suffered the alleged harm, "claims of corporate overpayment are treated as causing harm solely to the corporation, and thus, are regarded as derivative." *Gentile v. Rosette*, 906 A.2d 91, 99 (Del. 2006); *J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) (claim for corporate overpayment is derivative). Both shareholders and the company may be harmed by a single transaction, but the rele-

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[2] Shareholders' claims concerning Fannie Mae and Freddie Mac are governed by Delaware and Virginia law, respectively, because their corporate charters so designate. *Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 408–09 (7th Cir. 2018).

vant question in determining if a shareholder has a direct claim is whether "an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation." *Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004); *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1260 (Del. 2016) (relevant question is whether the stockholder "can prevail without showing an injury to the corporation") (quoting *Tooley*, 845 A.2d at 1039).

Of course, shareholders are, in some sense, always adversely affected by corporate overpayments, as overpayments reduce the value of shareholders' interest in the company. But, such "dilution in value of the corporation's stock … is merely the unavoidable result … of the reduction in value of the entire corporate entity." *Gentile*, 906 A.2d at 99. Such a harm, although real, is derivative.

The *Tooley* framework governs whether a claim is direct or derivative.

3. <u>The Claims Here Are Derivative.</u>

The court of appeals' analysis began, correctly, by holding, consistent with *Tooley*, that "[t]o decide whether" the shareholders' claims are derivative, "we begin with the cause of action." App., 27a.

The court of appeals then pointed to the APA's language affording a remedy to "[a] person suffering legal wrong … or adversely affected or aggrieved by agency action." *Id.* (quoting 5 U.S.C. § 702). The court reasoned that because shareholders suffered an "injury in fact" and are "within the zone of interests" of the APA, that therefore, their claim "is a direct

claim." *Id.* 28a–29a. The court of appeals did not mention, let alone apply, the *Tooley* framework to resolve whether the APA claims are direct or derivative.

The court of appeals erred by failing to recognize that the mere fact that a shareholder meets the basic requirements for alleging an "injury in fact" does not resolve whether the shareholder's claim is direct or derivative. Delaware law permits derivative lawsuits in part on the basis that a shareholder's "status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation." *Alabama By-Products Corp. v. Ede & Co. ex. Rel. Shearso*, 657 A.2d 254, 265 (Del. 1995). Put another way, the equitable standing rule for derivative actions "recognize[s] the truth that the stockholders are *ultimately* the only beneficiaries; that their rights are really, though indirectly, protected by remedies given to the corporation …." *Schoon v. Smith*, 953 A.2d 196, 201 n.10 (Del. 2008) (quotation omitted).

The fact that shareholders suffer, indirectly at least, some minimal "injury in fact" whenever the corporation suffers an injury plainly cannot mean that shareholders always have a direct claim whenever their interests are affected. To the contrary, *Tooley* and other abundant authority confirm that a shareholder showing an injury-in-fact, in the abstract, isn't enough; the shareholder must show an injury distinct from the injury to the company, or that a contract or statute affords a remedy specifically to the shareholder, to the exclusion of the company. The APA, however, confers no right or cause of action specifically on shareholders. Instead, it merely

states a general injury-in-fact requirement. Such a provision is simply not of the same ilk as a statute that, by its nature, confers a remedy specifically upon shareholders. *Cf. Citigroup Inc. v. AHW Inv. P'ship,* 140 A.3d 1125, 1140 (Del. 2016).

In short, absent an express statutory provision affording the right to shareholders to challenge actions that primarily affect the corporation, *Tooley* provides the relevant framework for resolving whether claims are direct or derivative.

Turning to first prong of *Tooley,* the injury shareholders alleged was that through the Third Amendment, the companies' profits were diverted permanently to the Government. The property the Government took through the Third Amendment was, specifically, Fannie's Mae's rights to receive and retain its future net earnings. The Third Amendment no doubt indirectly adversely affected Fannie's and Freddie's shareholders, but such effects were the "unavoidable result" of the reduction in value to the GSEs that occurred as a result of the Government taking all of the companies' net profits in the future. The injury occurred to the companies, who are the entities that paid the money over to the Government as required by the Third Amendment. Had the companies not paid that money to the Government, the shareholders would not have been injured. Because the shareholders' injuries are dependent upon the prior injury to the companies, the claims are derivative.

With respect to the second prong of *Tooley*—who would receive the benefit of any recovery—the recovery here would flow to the companies, as the compa-

nies are the entities who paid the net worth sweep to the Government.

4. Courts Are Divided on Whether Claims Arising from the Third Amendment Are Direct or Derivative.

As the Government notes, two courts of appeal have reached the opposite conclusion from the court of appeals here, finding that shareholders' claims relating to the Third Amendment are derivative.

The Seventh Circuit in *Roberts* observed that shareholders' complaint is that "the net worth dividend illegally dissipated corporate assets by transferring them to the Treasury," which is a "classic derivative claim[]." 889 F.3d at 409. The essential harm described in *Roberts* is the same as here: the Third Amendment unlawfully transferred the companies' assets to the Government.

The D.C. Circuit reached a similar conclusion with respect to shareholders' claim for breach of fiduciary duty. *Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 626–27 (D.C. Cir. 2017). That court, applying *Tooley*, emphasized the remedies the shareholders sought, including rescission of the Third Amendment and a declaration that the Third Amendment was not in the best interests of the companies—that is, relief that would accrue to the companies, not their shareholders. *Id.*

The Northern District of Iowa reached a similar conclusion, emphasizing that the "articulations of alleged harm generally describe harm to the GSE's stock value," which is a harm common to all share-

holders that derives from the primary harm caused to the company and therefore is "derivative in nature." *Saxton v. Fed. Hous. Fin. Agency*, 245 F. Supp. 3d 1063, 1071–73 (S.D. Iowa Mar. 27, 2017).

The decisions of the Seventh Circuit, D.C. Circuit, and the Northern District of Iowa were correct and applied the proper analytical framework. The court of appeals' decision below is in error.

This Court should therefore grant certiorari on this additional question—whether claims arising from the Third Amendment are direct or derivative—because deciding this issue will resolve a circuit conflict on claims brought subject to an important federal statute and under the Constitution.

B. HERA's Succession Clause Does Not Bar Shareholder Derivative Claims Where FHFA Faces a Manifest Conflict of Interest.

1. Proceeding from the premise that the shareholders' claims are derivative—a proposition with which *amici* agree—the Government argues those derivative claims are barred by the "succession clause" of HERA, 12 U.S.C. § 4617(b)(2)(A)(i). The Government argues that this clause abrogates background principles of corporate law and categorically precludes all derivative suits on behalf of Fannie and Freddie regardless of how serious a conflict of interest the FHFA faces in deciding whether to bring suit. The Government is wrong.

When Congress enacted HERA, it was not writing on a blank slate. Instead, HERA borrows directly from a substantively identical provision of the Fi-

nancial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").

HERA's succession clause provides that FHFA:

> shall, as conservator or receiver, and by operation of law, … succeed to … all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity.

12 U.S.C. § 4617(b)(2)(A)(i). FIRREA, in turn, provided that the FDIC:

> shall, as conservator or receiver, and by operation of law, succeed to … all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution.

12 U.S.C. § 1821(d)(2)(A)(i). Thus, HERA's succession clause is the same as FIRREA's. True, some words are changed—HERA, for example, refers to the "regulated entity" (i.e., Fannie Mae and Freddie Mac), while FIRREA referred to an "insured depository institution." But setting aside changes in the references to the parties to whom the clause applies, the *substance* of the succession clause is the same, word-for-word.

Critically, it is established law—and was so at the time Congress enacted HERA—that FIRREA's suc-

cession clause does *not* displace existing corporate law pursuant to which shareholders may maintain derivative suits where those that would decide whether to bring suit face a conflict of interest.

The leading case is a landmark Federal Circuit decision, *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1282–84 (Fed. Cir. 1999). There, a bank shareholder alleged the FDIC had breached contracts with the bank and committed unconstitutional takings by raising bank capital requirements during receivership beyond the levels to which the FDIC had previously agreed. The Court of Federal Claims held that FIRREA's succession clause precluded shareholders from maintaining any derivative claim. *Id.* at 1294. The Federal Circuit reversed, holding that where the FDIC faces a manifest conflict of interest in deciding whether to sue, shareholders may maintain a derivative suit notwithstanding FIRREA's succession clause. The court explained:

> We agree with the Court of Federal Claims that, as a general proposition, the FDIC's statutory receivership authority includes the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership. However, the very object of the derivative suit mechanism is to permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation.

Id. at 1295. The court found such a manifest conflict of interest because "FDIC was asked to decide on behalf of the depository institution in receivership whether it should sue the federal government based upon a breach of contract, which, if proven, was caused by the FDIC itself." *Id.*

First Hartford reflects established law under FIRREA. Other courts have reached the same holding. *Delta Savings Bank v. United States*, 265 F.3d 1017, 1022–24 (9th Cir. 2001) (permitting derivative suit notwithstanding FIRREA succession clause given "significant and manifest" conflict of interest FDIC faced in bringing lawsuit "against one of its closely-related, sister agencies"); *In re Fed. Home Loan Mtg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 797–98 (E.D. Va. 2009) (recognizing conflict of interest exception but finding no conflict); *Branch v. FDIC*, 825 F. Supp. 384, 404–05 (D. Mass. 1993) (FIRREA "does not alter the settled rule that shareholders of failed national banks may assert derivative claims").

Some courts have recognized that FIRREA's succession clause transfers to the FDIC the right to bring derivative claims *in general.*[3] No court, however, has rejected *First Hartford's* holding that

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[3] *See*, *e.g.*, *Pareto v. FDIC*, 139 F.3d 696, 700–01 (9th Cir. 1998) (holding FIRREA's succession clause precludes derivative suits in general but declining to consider "what claims … interested parties may have against the FDIC should it commit some wrongdoing" because "[t]hat issue [was] not before [the court]").

FIRREA preserved and did not negate corporate law that permits shareholders to pursue derivative claims where the entity managing the company (be it a board of directors, conservator, receiver, or someone else) faces a conflict of interest.

Given this well-established law at the time of the enactment of HERA, had Congress intended to displace equitable principles underlying derivative claims and categorically preclude all derivative claims regardless of any conflict of interest, it could have done so expressly in HERA's statutory language. Rather than doing so, however, Congress merely copied FIRREA, word-for-word with respect to the key terms of the succession clause upon which the Government relies. This Congressional decision provides strong evidence that Congress intended for HERA to be construed in accord with the established judicial construction of FIRREA. *Merrill Lynch Pierce Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates … the intent to incorporate its … judicial interpretations as well.") (internal quotations omitted).

The Government's hyper-technical construction of HERA's succession clause—leaving shareholders with zero rights—also disregards the structure of HERA, as well as its other provisions, and renders its construction untenable. Multiple provisions of HERA confirm that § 4617(b)(2)(A) cannot categorically extinguish "all" shareholders' rights. For example, HERA expressly provides that stockholders retain important economic rights, including rights to future distributions and to participate in a statutory

claims process regarding the companies' residual assets. *See* 12 U.S.C. § 4617(b)(2)(K)(i); 12 U.S.C. § 4617(c)(1). If HERA literally transferred all stockholder "rights, titles, powers and privileges" to FHFA without exception (which it did not), then the stockholders' rights to residual assets would accrue to FHFA, and there would be no need to include stockholders in any claims process. *See Branch*, 825 F. Supp. at 404–05 (analyzing similar terms of FIRREA to hold that "despite its strong language, [the succession clause of FIRREA] does not transfer all incidents of stock ownership").

Similarly, HERA expressly provides that during conservatorship a "regulated entity" may sue "for an order requiring the Agency to remove itself as conservator." 12 U.S.C. § 4617(a)(5)(A). Since FHFA controls Fannie and Freddie during conservatorship and cannot sue itself, this provision would be meaningless if HERA transferred literally all of the companies' rights to FHFA.

Moreover, any construction of HERA that categorically wipes out all rights of shareholders would raise serious constitutional concerns because it would effectively preclude judicial review of constitutional violations. This Court has explained:

> [It is a] well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress's intent to do so is manifested by "clear and convincing" evidence.

Califano v. Sanders, 430 U.S. 99, 109 (1977).

More specifically, when faced with statutes that would render parties harmed by a constitutional violation without a forum in which to seek redress for their injuries, the Court has construed the statutes not to apply to such claims. *South Carolina v. Regan*, 465 U.S. 367, 380 (1984) (holding that despite Anti-Injunction Act's literal terms, it "cannot bar [an] action" if as a result, the party "will be unable to utilize any statutory procedure to contest the constitutionality of" the government action); *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) ("[A] statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have little doubt that such a limitation … would be [an] unconstitutional infringement of due process.") (emphasis in original).

Notably, a decision the Government contends supports its position on the succession clause, *Perry Capital*, confirmed this important principle of statutory construction. The D.C. Circuit noted, in discussing HERA's "anti-injunction clause," that:

> [T]he [anti-injunction clause] only limits judicial remedies (barring injunctive, declaratory, and other equitable relief) after a court determines that the actions taken fall within the scope of statutory authority. *The Act does not prevent … constitutional claims (none are raised here) ….*

864 F.3d at 613–14 (emphasis added).

In excluding "constitutional claims" from the anti-injunction clause's scope, the D.C. Circuit was referring to prior decisions from the same court, in which it had held FIRREA's anti-injunction clause could not preclude remedies for constitutional violations. *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (1994). In that case, the court of appeals correctly held that although FIRREA's anti-injunction clause "bar[s] courts from "restraining or affecting the exercise of powers or functions of the [FDIC] as a conservator or a receiver," an exception to that general rule must be made where the FDIC "*has acted or proposes to act beyond, or contrary to, its … constitutionally permitted … powers ….*" *Id.* at 470, 472 (*per curiam* opinion adopting concurrence of Wald, J. as part of opinion; emphasis added). That holding, in turn, was based on this Court's decision in *South Carolina v. Regan*, discussed *infra*, in which this Court reiterated the principle that statutes should not be construed to deny remedies for constitutional violations.

The court of appeals in this case correctly recognized the same principle of statutory construction. It held, with respect to Count IV of the shareholders' complaint, in which the shareholders alleged that the structure of FHFA violated the U.S. Constitution, that different principles of statutory construction apply because "[o]nly a 'heightened showing' in the statute may be interpreted to 'deny any judicial forum for a colorable constitutional claim.'" App., 55a–56a (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Because the succession clause is devoid of any such express language foreclosing constitutional

claims, the court of appeals correctly decided that the succession clause could not bar such a claim. This Court should reaffirm that principle with respect to HERA's succession clause. Moreover, even if the succession clause could be construed to meet the "heightened showing" contemplated by *Webster*, the result would be that HERA would be unconstitutional as applied to the degree it negates a remedy for a constitutional claim.

In sum, the text, structure, and legislative history underlying HERA make clear that its "succession clause" does not bar shareholder derivative claims. And were this Court to hold that HERA does bar derivative claims, it would render the "succession clause" unconstitutional as applied to shareholders' takings and illegal exaction claims.

2. Moreover, as the Government highlights, two courts of appeal have reached the opposite conclusion from the court of appeals here, finding that shareholders' claims relating to the Third Amendment are barred by the "succession clause."

The D.C. Circuit in *Perry* declined to construe HERA's succession clause consistently with prior courts' construction of FIRREA's succession clause, holding instead that HERA's succession clause "does not permit shareholders to bring derivative suits on behalf of the companies even where the FHFA will not bring a derivative suit due to a conflict of interest." 864 F.3d at 625

The Seventh Circuit reached the same conclusion in *Roberts*, holding that it did "not see a conflict-of-interest exception implicit in" HERA's succession

clause and that instead, the clause is "absolute" in abrogating background principles of corporate law that permit shareholders to pursue derivative claims. 889 F.3d at 409–10.

These decisions are wrong and squarely conflict with the decision of the court of appeals below.

This Court should therefore grant certiorari on this question—whether claims arising from the Third Amendment are barred by HERA's succession clause—because deciding this issue will resolve a circuit conflict on claims brought subject to an important federal statute and under the Constitution.

CONCLUSION

For these reasons, the Government's petition for a writ of certiorari should be granted. The Court should also direct the parties to brief and argue an additional question: whether shareholders' claims are direct or derivative.

Respectfully submitted,

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